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In the

Supreme Court of the United States

OCTOBER TERM, 1967

CHICAGO GRAIN TRIMMERS ASSOCIATION, INC., AND NEW AMSTERDAM CASUALTY COMPANY,
Respondents,

vs.

R. C. ENOS, Deputy Commissioner,

and

AGNES M. BANKS, widow of JOHN J. BANKS, deceased, and representative of JAMES M. BANKS, JANICE BANKS, and CATHERINE M. BANKS, minor children of JOHN J. BANKS, deceased,
Petitioner.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER AGNES M. BANKS

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INDEX

PAGE

Opinion below ..... (A. 109)

Jurisdiction 2

Question presented 2

Statutes involved 3

Statement of the Case 4

Argument:

A. With respect to the question of whether or not the doctrine of res judicata is applicable.

1. The doctrine is not applicable because of 33 U.S.C. 922 8

2. The doctrine is not applicable because of the facts of the case 14

B. Court ordered remittitur does not bar a claim under 33 U.S.C. 933 (g) 22

C. There was competent evidence to support a causal relationship between the occurrence and death of John Banks 27

Conclusion 29

CITATIONS.

Cases:

American Mutual Liability Ins. Co. of Boston v. Lowe, 85 F. 2d 625 (C.A. 5 1936) 10

Arkansas Cattle Co. v. Mann, 130 U.S. 69 (1888) 24

Ash Sheep Co. v. U. S., 252 U.S. 159 (1919) 19

Bell v. O'Hearne, 284 F. 2d 777 (C.A. 4 1960) 25, 26

Calbeck v. A. D. Suderman Stevedoring Co., 290 F. 2d 308 (C.A. 5 1961) 14

PAGE

Candado Stevedoring Corp. v. Lowe, 85 F. 2d 119 (C.A. 2 1960) 26

Candado Stevedoring Corp. v. Willard, 185 F. 2d 232 (C.A. 2 1950) 10

Cardillo v. Liberty Mutual Ins. Co., 340 U.S. 469 (1950) 27

Chapman v. Huage, 296 U.S. 526 (1935) 26

Commissioner v. Sunnen, 333 U.S. 591 (1947) 17

Cromwell v. County of Sac., 94 U.S. 351 (1876) 18

Eschbach v. Brown, D.C. Ill. 1949, 84 F. Supp. 825 Rev. other grounds 181 F. 2d 860 16

Flamm v. Hughes, 329 F. 2d 378 (C.A. 2 1964) 12

Gallagher v. Carol Const. Co., 272 N.Y. 127 (1936) .. 25

In re Lovel Bldg. Co., 116 F. Supp. 383 (D.C. N.J.) (1953) 24

Jarka Corp. v. Hughes, 299 F. 2d 534 (C.A. 2 1962) .. 14

Lewis v. U. S., 17 F. Supp. 543 (D.C. Col. 1936), Affmd. Sub. Nom. Sanders v. Commissioner of Internal Rev. 101 F. 2d 407 (C.A. 10) 24

Mercoid Corp. v. Mid Continent Co., 320 U.S. 661 (1943) 18

Northern Pacific R. R. Co. v. Herbert, 116 U.S. 642 (1885) 24

O'Keefe v. Smith Associates, 380 U.S. 359 (1965) 27

O'Leary v. Brown, 340 U.S. 504 (1950) 27

Reynolds v. Stockton, 140 U.S. 254 (1890) 19

Ross Packing Co. v. U. S., 42 F. Supp. 932 (E.D. Wash. 1942) 24

PAGE

Russell v. Place, 94 U.S. 606 (1876) 18

Seaboard Marine Repair Co. v. Cardillo, 166 F. 2d 431 (C.A. 2 1948) 9, 10

Sherrer v. Sherrer, 334 U.S. 343 (1947) 19

Southern Pac. Ry. v. U. S., 168 U.S. 1 (1897) 18

Stansfield v. Lykes Bros. S.S. Co., 124 F. 2d 999 (C.A. 5 1942) 14, 20

Tudman v. American Ship Bldg. Co., 170 F. 2d 842 (C.A. 7 1948) 14

Urbain v. Knapp Bros. Mfg. Co., 217 F. 2d 810 (C.A. 6 1954) 9

Vandemia v. Christaldi, 221 F. 2d 103 (C.A. D.C. 1955) 9

Voris v. Eikel, 346 U.S. 328 (1953) 12, 26

Weyerhaeuser Timber Co. v. Marshall, 102 F. 2d 78 (C.A. 9 1939) 26

STATUTES.

Longshoremen's and Harbor Workers' Compensation Act

Sec. 22 (33 U.S.C. 922) 3

Sec. 21 A (33 U.S.C. 921a) 3

Sec. 33 (g) 33 U.S.C. 33g) 3, 23

Sec. 30 a, b, f, (33 U.S.C. 30 (a) (b) (f) 15

RESTATEMENT.

Judgments, Sec. 62 (b) 19

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BRIEF FOR PETITIONER AGNES M. BANKS

A. REFERENCE TO REPORTS OF OPINION

The opinion of the Court of Appeals is reported at 369 F. 2d 344.

B. STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Court of Appeals was entered on July 13, 1966. The petition for rehearing was denied by that court on October 6, 1966. A motion to extend time for filing a writ of certiorari to March 5, 1967, was allowed by Justice Tom C. Clark on January 4, 1967. The Petition for a Writ of Certiorari was filed on March 4, 1967, and was granted on October 9, 1967. Jurisdiction of this Court rests on Title 28 U.S.C.A. 1254 (1).

C. QUESTIONS PRESENTED FOR REVIEW

1. Where under title 33 U.S.C. 922, the Deputy Commissioner in a case under the Longshoremen's and Harbor Workers' Compensation Act, has the power to issue a new order based on his own initiative or upon the application of any other party in interest, because of mistake in determination of facts, is it not contrary to said statute to invoke the doctrine of res judicata and deny the Deputy Commissioner that power especially where a timely petition had set forth facts of a new occurrence that caused the Harbor Worker's death and was the sole basis for the new order granting an award for the death of said Harbor Worker?

2. Is the acceptance of $19,000 after a $30,000 jury verdict pursuant to an order of remittitur entered by the trial judge in an action against alleged negligent 3rd party a compromise of that action within the meaning of the term "compromise" in the Longshoremen's and Harbor Workers' Compensation Act and thereby a bar to a claim for compensation?

D. STATUTES AND REGULATIONS INVOLVED

Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437, as Amended:

33 U.S.C. 921(a)

> "In any court proceedings under section 921 of this title of other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal."

33 U.S.C. 922 (Section 22 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1437, as amended) provides in pertinent part:

> "Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation."

33 U.S.C. 933 (g) of the Longshoremen's and Harbor Workers' Compensation Act 44 Stat. 1424 provides in part as follows:

> "(g) If a compromise with such third person is made by the person entitled to compensation or such

representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall become liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval."

E. STATEMENT OF THE CASE

Decedent, John J. Banks, was employed by the Chicago Grain Trimmers Association, Inc., as a grain trimmer since 1934, which involves the loading and unloading of grain from barges and vessels, to and from various located grain elevators, with port locations and grain elevator locations varying from day to day, depending on traffic (incoming and outgoing).

On January 30, 1961, at approximately 4:45 P.M., upon arrival at his home from work and while at head of basement steps, he suddenly fell forward, with his arms at his sides striking the concrete floor approximately 10 steps down, at no time crying out or attempting to arrest his fall and thereby being rendered unconscious without ever regaining his consciousness and expiring on February 21, 1961.

A claim was filed under the Longshoremen's and Harbor Workers' Compensation Act for compensation benefits on February 20, 1961, as number 46-71, alleging an accidental injury at work on January 26, 1961, which caused his fall on January 30, 1961. There were no eye witnesses to this occurrence and no testimony given regarding this accident except for some incomplete hearsay statements. The only possible evidence of any injury alleged to have accidentally occurred on January 26, 1961, was a little black speck on decedent's forehead (A. 8, 9). The Deputy Commissioner found that as a result of the evidence presented with relation to the

accident of January 26, 1961, that it was not established that the employee's death was the result of an injury which arose out of the course of his employment on January 26, 1961. (A. 10) This finding was made on June 8, 1961.

Subsequent to June 8, 1961 the claimant was notified that there was a witness to an accident which took place on January 30, 1961, at 2:30 P.M. (two hours prior to his fall from the top of the steps at home.) At the hearing of the first claim involving the alleged occurrence the eyewitness, Mike Miramontez, to the second occurrence was unknown to the claimant but was known to the respondent insurance company which had a statement from Mike Miramontez which told them about the occurrence of January 30, 1961, but this information was withheld by them from the Deputy Commissioner and the claimant. (A. 38) This witness was contacted and subsequent thereto another claim (46-73) was filed (within 1½ months subsequent to the rejection of the first claim) before the Longshoremen's and Harbor Workers' Commission alleging that John Banks was injured on January 30, 1961, which injury caused his death. This claim was filed on August 22, 1961. The respondent filed two forms in response to this claim. In both forms they assert the claim of res judicata because of the prior finding. (A. 101, 102) The second case was heard by the same Deputy Commissioner. After the second hearing he issued an award in favor of the claimants finding that the injury and death arose out of and in the course of his employment as a result of the accident of *January 30, 1961.* (A. 13) It is important to illustrate the salient features of each occurrence.

	Accident 1	Accident 2
Date:	January 26, 1961	January 30, 1961
Place:	Gateway Elevators (A90) 127th & Calumet (A91) Chicago, Illinois	Norris Elevators (A23) 98th & Calumet River Chicago, Illinois
Eyewitnesses:	None	Mike Miramontez (A23)
Time:	Unknown	2:00 P.M. (A23)
Type of work:	Button man (A8)	Tripper (A23)
How injured:	Allegedly struck by steel cable in forehead. (Hearsay) (A 8, 91)	Struck on top of head by rope falling 50 feet weighing about 30 pounds. (A25)
Visual injury:	Little black spot on forehead (A91)	Constant rubbing of head (A 24)

After the first trial before the Deputy Commissioner, and after a second claim was filed before the same Deputy Commissioner, but prior to the second trial of that claim, 3rd party action was brought in the Federal Court for the Northern District of Illinois by the personal representative of the Estate of John Banks against the Norris Grain Company arising out of the occurrence of January 30, 1961 which subsequently caused the death of John Banks. This action arose out of the same occurrence at 98th and Calumet River, Chicago, Illinois which was subject to the second hearing before the Deputy Commissioner with basically the same witnesses testifying in both the Federal Court action and the second hearing before the Deputy Commissioner. On May 3, 1963 a jury returned a verdict in favor of the plaintiff and against the Norris Grain Company for the wrongful death of John Banks in the sum of $30,000. The defendant Norris Grain Company in accordance with the law moved the

Court for a judgment notwithstanding the verdict or in the alternative for a new trial.

Judge Holland, who presided during the trial of the cause of action ordered that the motion for a new trial would be allowed unless the libellant within 10 days accepted a remittitur of $11,000. (A. 12) The libellant accepted the remittitur on May 17, 1963, and a judgment was entered and satisfied in the amount of $19,000. (A. 11)

Thereafter, the employer and its insurance carrier filed a motion with the Deputy Commissioner alleging that the acceptance of the court ordered remittitur was a compromise without the employer's written approval thereby barring the pending claim. (A. 21)

The second hearing before the Deputy Commissioner proceeded on August 29, 1963 on the allegation of the injuries and death sustained by John Banks on January 30, 1961. The employer asserted the two defenses: that the hearing relating to the alleged accident of January 26, 1961 was res judicata; and that the acceptance of the court ordered remittitur was a bar to this action. On January 27, 1964, findings of fact and award were entered by R. C. Enos, Deputy Commissioner. (A. 19)

An action was filed in the United States District Court to set aside and enjoin the enforcement of the award of the Deputy Commissioner. The claimants were not represented in this hearing. Cross motions for summary judgment were filed with the district court and on June 2, 1965, the district judge adopted the findings of fact and conclusions of law filed on behalf of the Deputy Commissioner. An appeal was taken to the Court of Appeals (C.A. 7), who ruled that the original hearing relating to the alleged accident of *January 26, 1961,* was res judicata as to the accident of *January 30, 1961.* (A. 109)

G. ARGUMENT

A. WITH RESPECT TO THE QUESTION OF WHETHER OR NOT THE DOCTRINE OF RES JUDICATA IS APPLICABLE.

1. The Doctrine of Res Judicata Is Not Applicable to this Case because of Section 33 U.S.C. 922 of the Longshoremen's and Harbor Workers' Compensation Act.

The Longshoremen's and Harbor Workers' Act, 33 U.S.C. 901, *et seq.*, in the nature of welfare legislation, was obviously designed and passed to provide a forum for injured workers to present their cases in an informal and uncomplicated manner without requirement of legalistic formalities observed in courts of law.

The deputy commissioner is not required to be a lawyer, and the injured party may proceed (pro-se) without services of a lawyer and without being hampered by a strict and formal observation of the rules of evidence as in regular court practice.

Congress's effort to design an uncomplicated informal forum has created certain handicaps upon the injured claimant in that it failed to provide the injured workman with a:

1. Right of discovery procedures.
2. Right to interrogatories.
3. Method of dealing with adverse witnesses prior to and during the hearing before the deputy commissioner.

(This latter comment will be amplified in the next section of this brief.)

Section 22 (33 U.S.C. 922) of the Longshoremen's and Harbor Workers' Act has the purpose of protecting all parties for a period of one year subsequent to an award by a Deputy Commissioner. It is liberal with good reason. In addition to the consideration that the Deputy Commissioner is not a lawyer and that many parties who present claims are not represented by lawyers, there is no requirement that the Deputy Commissioner make findings of fact and conclusions of law as contemplated by 5 U.S.C. 1007 (b) in law suits. The absence of such findings on undisputive evidence does not require a remand of either administrative or court decisions. *Vandemia* v. *Christaldi,* 221 F. 2d 103, 106 (C.A. D.C. Cir. 1955), *Urbain* v. *Knapp Bros. Mfg. Co.,* 217 F. 2d 810, 816 (C.A. 6, 1954), cert. den. 349 U.S. 930.

Under Sec. 22, the application of any party in interest should be filed within the one year period. In the case at bar, the first decision of the Deputy Commissioner denying benefits was rendered on June 8, 1961. (A-10) The second application was filed 1½ months later. (A-18) Therefore, there was a timely filing and compliance within this section of the Act.

The opinion, by the Court of Appeals (C.A. 7), in this matter cited two reasons why Sec. 22 was not applicable: 1. The Deputy Commissioner was not aware of the January 30, 1961 injury until more than one year after the rejection of the first claim of January 26, 1961; and 2. This section was inapplicable to this case because the claimants at no time disputed the findings of fact made by the Deputy Commissioner on the first hearing.

The first reason given for the inapplicability of Sec. 22 by the Court was clearly erroneous in that the application was filed 1½ months following the rejection

of the claim (A. 18) and not more than one year as stated in the opinion of the Court. The filing of a claim tolls the statute of limitations. *American Mutual Liability Co.* v. *Lowe,* 85 F. 2d 625, 627-628 (3rd Cir. 1936); *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431, 432 (2d Cir. 1948). Furthermore, it should not be contended that the statute of limitations barred this claim for the reason that it was not decided in one year. The courts have uniformly held that Sec. 22 did not require the Deputy Commissioner to file his decision within one year of the prior decision. *Candado Stevedoring Corp.* v. *Willard,* 185 F. 2d 232, 233 (C.A. 2d Cir. 1950); *American Mutual Liability Insurance Co.* v. *Lowe,* 85 F. 2d 625, 627-628 (C.A. 5th Cir. 1936); *Seaboard Marine Repair Co.* v. *Cardillo,* 166 F. 2d 431, 432 (C.A. 2d Cir. 1948).

The second reason given as the basis for not applying Sec. 22 by the Court below was that said section was inapplicable in that there was no dispute of the findings of June 8, 1961. In the case of *Candado Stevedoring Corp.* v. *Willard, supra,* 185 F. 2d 232 at 233, the court said, "that the applicant called the paper he filed a 'claim for compensation' instead of an 'application' for review is of no moment". There was no need for Mrs. Banks to specifically urge that there had been a "mistake in the determination of fact by the Deputy Commissioner" in his decision denying benefits. This proceeding was a continuing challenge to his "determination of fact". The entire evidence in the second claim was intended to show that the previous finding was a mistake in a determination of fact. At the time of the second hearing the Deputy Commissioner was apprised of the defense of res judicata. He knew that the hearing involved the same conflicting death of John Banks arising out of

his employment. He was informed, at the second hearing, that John Banks was hurt on January 30, 1961 and that the respondents had knowingly concealed this at the time of the original hearing. The Deputy Commissioner also was informed respondent had in their possession a written statement obtained by them from an eyewitness at the time of the first hearing which fully informed them of the accident of January 30, 1961. The respondents were the only persons who had knowledge of the evidence of any eye witness and the real facts pertaining to the occurrence of January 30, 1961. Said respondents knowingly withheld said information from the Deputy Commissioner and from the claimants. There were no pretrial discovery procedures available under the Longshoremen's and Harbor Workers' Act to avail them of this information. Fortunately the information pertaining to the eye witness became available approximately one month after the findings denying benefits in the first hearing. The second application was filed alleging the new date of January 30, 1961 as the date of accident and pertaining to a different location of occurrence. The same Deputy Commissioner presided at the second hearing. He heard the witnesses and the facts pertaining to the January 30, 1961 occurrence. He heard the eye witness to this occurrence. He found sufficient evidence to change his original findings denying benefits to a finding allowing benefits, as a result of the occurrence of January 30, 1961. The Deputy Commissioner heard sufficient evidence to support a related and causative reason for John Banks to keel over two hours after he was hit on the top of the head with rope that weighed 30 pounds and fell from a considerable height. This was not the same as in the first hearing where no witnesses testified seeing the decedent injured; where

the only injury was a speck on decedent's forehead and the fact that he had worked for 3 days subsequent to the first alleged occurrence. The Deputy Commissioner was apprised of both occurrences. He was apprised of the defense of res judicata. He heard evidence at the second hearing relating to testimony at the first hearing. Why should the dependent family members be denied their claim for the death of their breadwinner because there was no technical application entitled "modification order" or "application for review"? Why should technicalities be permitted to be asserted in defense to defeat a claim when the sole purpose of a procedure of this nature is to avoid legal formalities that produce harsh results? Under Sec. 22 upon the Deputy Commissioner's own initiative he could have acted to consider this as an application for rehearing or for modification. The fact remains that within the statutory period of limitations a claim was filed wherein it was alleged and proven (before the same Deputy Commissioner who heard the first case) that the decedent was injured in the course of his employment causing his death. Is this a typical result arising from the highly heralded remedial legislation enacted by Congress purporting to protect the longshoremen and harbor workers? Should the sophisticated employer and his insurance carrier be permitted to take advantage of technicalities and successfully assert a defense of res judicata in a situation such as this?

In the case of *Voris* v. *Eikel,* 346 U.S. 328, at 333 (1953) this Court said, "This act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results."

The Court below (C.A. 7) relied upon the case of *Flamm* v. *Hughes,* 329 F. 2d 378, 380 (C.A. 2d Cir. 1964)

as the basis for the reasoning that Sec. 22 is inapplicable because there was no factual dispute within 30 days following the rejection of the first claim. Said case is not analogous here in that there was no second hearing or presentation of additional evidence upon which the deputy Commissioner could act. This case basically challenged the constitutionality of the Longshoremen's and Harbor Workers' Act. There was no subsequent change in conditions which disclosed factual error in the original hearing. Though our Deputy Commissioner had a petition before him which was not expressly labeled "Application for Review" he knew that it was a review of his former findings, and also knew that it was a claim for the error in determining the facts and change of conditions. No evidence could have been presented in the original hearing relative to the January 30, 1961 occurrence because the claimants had no knowledge of any witnesses at that time. However, the respondents knew of such a witness and withheld this knowledge from the Deputy Commissioner and the claimants.

The court below in its opinion seems to indieate that in order for Sec. 22 to be applicable the claimant must file a petition within 30 days disputing the findings of fact of the Deputy Commissioner. This interpretation is clearly erroneous. If this interpretation was correct it would negate the purpose of Sec. 22, as Sec. 22 was expressly intended to authorize the Deputy Commissioner to consider newly presented evidence after a previous determination of facts had become final. It takes effect and becomes final 30 days after the Deputy Commissioner's findings, provided same are not contested. It is to protect the litigants against any injustice that might arise within the one year period subsequent to a finding by a deputy commissioner. The whole purpose of this

section is to prevent the application of the doctrine of res judicata. Cases in support of the position that Sec. 22 applied after the 30 day period in which the findings of the Deputy Commissioner become final are: *Tudman* v. *American Ship Building Co.*, 170 F. 2d 842, 844. (C.A. 7th Cir. 1948); *Stansfield* v. *Lykes Bros. S.S. Co.*, 124 F. 2d 999, 1004 (C.A. 5th Cir. 1942); *Calbeck* v. *A. D. Suderman Stevedoring Co.*, 290 F. 2d 308, 309 (C.A. 5th Cir. 1961); *Jarka Corporation* v. *Hughes*, 299 F. 2d 534 (C.A. 2d Cir. 1962).

2. The Doctrine of Res Judicata Is Not Applicable to the Facts of this Case.

In the event this Court determines that Sec. 22 is not applicable herein, we must respectfully suggest that neither can the doctrine of res judicata be applicable as a defensive measure against the decedent claimant.

This argument is based on the fact that Congress in its zeal for simplification practically legislated the intended proceedings before the intended forum out of any judicial semblance in that it omitted the long fought for judicial safeguards of:

1. pre-hearing depositions.
2. interrogatories.
3. rules concerning adverse witnesses (under the control of the employer or his insurer.)

The reason for simplicity, benign in origin, nevertheless to some degree was necessary to utilize the talents of the legally unsophisticated Deputy Commissioners and those appearing unrepresented before them. However, simplicity can also be a trap for the untrained and unwary injured claimants because the sophisticated advantage of the employer and his insurance carrier even

to the extent of withholding evidence vital to a claimants recovery.

The doctrine of res judicata, an important facet of our jurisprudence, has been continually extended to such a degree by the courts that it no longer remains a simple legal doctrine but has become a complex legal enigma being applied many times to unpredictable and complicated factual situations.

In the present instance the applicability of res judicata is to encourage the practice of possible deceit by employers or their insurance carriers by withholding vital information from injured claimants as a means to defeat their Congress legislated rights. This would be true even in the light of newly discovered evidence.

Congress in passing the Longshoremen's and Harbor Workers' Act did provide against employers from withholding information. The pertinent part of this section (33 U.S.C. 30) are as follows:

> "(a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the Secretary a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day and hour when and the particular locality where the injury or death occurred; and (5) such other information as the Secretary may require. A copy of such report shall be sent at the same time to the Deputy Commissioner in the compensation district in which the injury occurred.
>
> "(b) Additional reports in respect of such injury and of the condition of such employee shall be sent by the employer to the Secretary and to such Dep-

uty Commissioner at such times and in such manner as the Secretary may prescribe."

"(f) Where the employer or the carrier has been given notice, or the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier has knowledge, of any injury or death of an employee and fails, neglects, or refuses to file report thereof as required by the provisions of subdivision (a) of this section the limitations in subdivision (a) of section 913 of this title shall not begin to run against the claim of the injured employee or his dependents entitled to compensation, or in favor of either the employer or the carrier until such report shall have been furnished as required by the provisions of subdivision (a) of this section."

On May 18, 1961, the date of the first hearing, (A. 77) form #U.S. 202, required to be filed under above section, had not been filed either by the employer or the insurance carrier (accident January 30, 1961), even though the insurance carrier had secured a statement regarding said occurrence from the only eye witness (Mike Miramontez) on April 8, 1961. They alone were completely knowledgeable as to the date, time and place of said occurrence and had also furnished a resume of same to their counsel for his use at the hearing covering this episode of January 30, 1961. (A. 38)

It is therefore obvious that there was no compliance with section 30.

In the case of *Eschbach* v. *Brown,* D.C. Ill. 1949, 84 F. Supp. 825, reversed on other grounds 181 F. 2d 860, the court held that where the employer had full knowledge that the employee was suffering from tuberculosis, employers belief that disease did not arise out of employment did not relieve him of the duty of filing report

required by section 30, and that limitations had not begun to run against employee's claim.

Had the employer and the insurance carrier filed a form U.S. 202 relating to the second occurrence prior to the time of the original hearing there could have been a different result in that the claimant and her attorney would have been knowledgeable and able to investigate the matter. They had no knowledge of the existence of any witness to the alleged occurrence of January 26, 1961. Information which would naturally appear in form U.S. 202 would give claimant access to the necessary information as to the January 30th occurrence. It was the deliberate act of the employer and the insurance carrier to withhold this information contrary to Section 30 that was utilized by the employer and the insurance carrier to bar the injury claim which caused the death of John Banks.

A review of the decisions pertaining to res judicata by this Court indicates that there are certain principles of law applying to this section which are general in nature, and that the facts of each case determines whether or not this doctrine is applicable.

In the case of *Commissioner* v. *Sunnen*, 333 U.S. 591, 597, this Court said, "The general rule of res judicata applies to repetitious suits involving the same course of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on its merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but

as to any other admissible matter which might have been offered for that purpose. *Cromwell* v. *County of Sac.*, 94 U.S. 351, 352. The judgment puts an end to this cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata', 38 Yale L. J. 299; Restatement of the Law of Judgments, Sec. 47, 48.

But when the second action between the same parties is upon a different cause or demand, the principle of "res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell* v. *County of Sac, supra,* 353. And see *Russell* v. *Place,* 94 U.S. 606; *Southern Pacific R. Co.* v. *United States,* 168 U.S. 1, 48; *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U.S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgment, Sec. 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv. L. Rev. 1."

In the case of *Ash Sheep Co.* v. *U.S.*, 252 U.S. 159, 170, this Court said: "Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the Court of Appeals that 'a judgment is not conclusive on any question which from the nature of the case or the forum of action, could not have been adjudicated in the case in which it was rendered."

In the case of *Sherrer* v. *Sherrer,* 334 U.S. 343, 350, this Court said: "Insofar as cases originating in the federal courts are concerned the rule has evolved that the doctrine of res judicata applies to the adjudications relating to the jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."

In *Reynolds* v. *Stockton,* 140 U.S. 254, 270-271, this Court said, "But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between parties, it must, with the limitations heretofore stated be responsive to the issues tendered by the pleadings."

Section 62, Restatement of Judgments, states that when a judgment with preclusive effect is rendered, the plaintiff cannot maintain an action—upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action except . . . (b) where the defendant's fraud or misrepresentation prevented the plaintiff from including the entire claim in the original action. . . .

Applying the above cited law to the facts of this case we find that the claim of res judicata fails in many respects. To begin with—the first claim involved case No. 46-71 which pertains to an accident of January 26, 1961 at Gateway Elevators, 127th & Calumet, Chicago, Illinois, where decedent was working as a button man. No other issues other than a causal relation were involved. The second matter, No. 46-73, pertained to an occurrence on January 30, 1961 at Norris Elevator, 98th and Calumet River, Chicago, Illinois, where the decedent was working as a tripper. The accident of January 30, 1961 was not in issue in case No. 46-71, since the hearing on case No. 46-71 pertained to an accident which occurred on a different date, at a different place, at a different time, and while the decedent was doing a different job, then obviously those issues were not litigated in the first hearing and the doctrine of res judicata could not be applicable.

Likewise, if the employer and his insurance carrier withheld information that was in their possession at the time of the first hearing concerning a different occurrence (January 30, 1961) and never filed a report of such occurrence as required by Sec. 30 of the Longshoremen's and Harbor Workers' Act they were guilty of a deceitful practice which would have prevented them from asserting the doctrine of res judicata.

In the case of *Stansfield* v. *Lykes Bros., S.S. Co.* (C.A. 5 1941) 124 F. 2d 999, a case under this same act, a Deputy Commissioner originally entered an award on June 6, 1939. On February 1, 1941 he modified the award increasing the award 10%. The new evidence presented during the second hearing consisted of additional testimony on the part of the claimant to the effect that when he raised his arms to shoulder level or above this would

cause a pressure upon the trachea causing certain discomfort. At the time of the first hearing this knowledge was known to the claimant but was not disclosed by him.

On p. 1004 of the opinion the court says:

> "It remains only to inquire whether claimant, knowing at the time of the first hearing, of the disability he now complains of, the pressure on his trachea, by entering into an agreed statement of facts, which did not take this pressure into account in fixing his disability, is precluded from bringing it forward in the second hearing to establish that the commissioner made a mistake in the determination of a fact, the nature and extent of his disability. We do not think so. The statute not only does not authorize, it prohibits settlements or agreements, except those arrived at in certain limited cases and in a certain definite way, affecting the compensation to which claimant is entitled by law. Under these statutes, neither stipulation nor agreement as to the extent of injuries and the amount of compensation to be paid, will estop claimant, or in any manner prevent him from recovering what is justly due him.
>
> "The determination of that is at last for the commissioner. His decision on it, if supported by evidence, is final. The commissioner definitely found, that because of the fact that evidence of the pressure on the trachea was not before him, he mistakenly found the fact as to claimant's disability. The re-award in question here was made to correct that mistake. We find nothing in the proceedings, nothing in the re-award itself, which subjects it to corrective review. The libel should have been dismissed. The decree is reversed and the cause is remanded with directions to dismiss it."

B. IN REFERENCE TO THE FOLLOWING QUESTION: DOES AN ACCEPTANCE OF A COURT ORDERED REMITTITUR, WITHOUT EMPLOYER APPROVAL, SUBSEQUENT TO A PROCEEDING AGAINST AN ALLEGED NEGLIGENT THIRD PARTY, BAR A CLAIM FOR COMPENSATION UNDER 33 U.S.C. 933 (g) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT.

On June 5, 1967 this Court invited the Solicitor General to file a supplemental brief in this matter addressed to the bearing of 33 U.S.C. 933 (g) of the Longshoremen's and Harbor Workers' Act. The petitioner is of the opinion that the brief filed by the Solicitor General clearly and adequately projects the question to the Court and that the filing of an additional brief covering this subject matter would not be of further assistance. We therefore, adopt the argument contained in the brief of the Solicitor General concerning the above question as our argument thereto. The brief of the Solicitor General is set forth as follows:

"On June 5, 1967, the Court invited the Solicitor General to file a supplemental brief in this case, addressed to the bearing of 33 U.S.C. 933(g).

Section 33 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 933, provides that an individual entitled to compensation under the Act who thinks that someone besides his employer is liable in damages to him may bring suit against such third person, and may thereafter obtain a compensation award under the Act against his employer to the extent that the allowable benefits exceed the third-party recovery. If, however, he merely accepts the compensation award without instituting suit against the third person, all his rights against the third person are assigned to the em-

ployer. Furthermore, Section 33(g) of the Act, 33 U.S.C. 933(g), provides that:

> 'If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation * * * only if such compromise is made with his written approval.'

Petitioner's husband, an employee of the respondent Chicago Grain Trimmers Association, Inc., suffered injuries during his employment that resulted in his death. Petitioner instituted a wrongful death action against the Norris Grain Company, claiming that it was responsible for the injuries. After a jury returned a $30,000 verdict in her favor, Norris Grain Company moved the district court to set aside the verdict or to grant a new trial. The district judge ordered that the motion for a new trial stand granted unless petitioner entered in the record a remittitur in the sum of $11,000. Without seeking or obtaining the consent of the Chicago Grain Trimmers Association or its insurance carrier, petitioner accepted the remittitur. Respondent asserts that such acceptance was a "compromise" of petitioner's claim within the meaning of Section 33(g) which, not having received the written approval of the employer, resulted in the forfeiture of any rights petitioner and her children might otherwise have to compensation. The Deputy Commissioner did not rule expressly on this contention, although he necessarily rejected it since he awarded compensation, deducting from the award petitioner's recovery against the third party. The district court upheld the Deputy Commissioner's award. The court of appeals reversed on the ground that *res judicata* precluded the award

of compensation benefits. It did not reach the question whether the award was also barred by Section 33(g). We think it was not.

By its express terms, Section 33(g) is operative only if there is a (1) compromise (2) between an employee entitled to benefits (or his representative) and a third party liable to that employee. Neither of these requirements is satisfied by an order of remittitur. Such an order is an adjudication that damages in excess of a particular amount are not recoverable. See *Arkansas Cattle Co.* v. *Mann*, 130 U.S. 69, 73-74; *Northern Pacific R.R. Co.* v. *Herbert*, 116 U.S. 642, 646-647; 6A Moore, *Federal Practice*, ¶ 59.05[3]. It involves no agreement based on mutual concessions; and certainly it is not the product of agreement between the parties to the litigation. A compromise, on the other hand, does involve an agreement between the parties, and mutual concessions by the parties are an essential element of that agreement. See, *e.g.*, *Lewis* v. *United States*, 17 F. Supp. 543, 546 (D. Col.), affirmed *sub nom. Sanders* v. *Commissioner of Internal Revenue*, 101 F. 2d 407 (C.A. 10); *Ross Packing Co.* v. *United States*, 42 F. Supp. 932, 934 (E.D. Wash.); *In re Lovel Bldg. Co.*, 116 F. Supp. 383, 385 (D. N.J.).

This distinction has been recognized by the New York Court of Appeals in construing the New York employees' compensation act, upon which the Longshoremen's and Harbor Workers' Compensation Act was based.[1] Confronted with the same question—whether an employee's remittitur without the employer's consent constituted a

[1] See *Lawson* v. *Suwannee S.S. Co.*, 336 U.S. 198, 205; H. Rep. No. 1190, 69th Cong., 1st Sess., p. 2 ("The bill follows in the main the New York State compensation law, which is considered one of the best").

compromise—the New York court held that a remittitur of $3,000 dollars of a $5,000 judgment did not constitute a compromise. It stated:

> The judgment for $2,000 was rendered in accordance with immemorial common law practice after a full and constitutional jury trial. The optional order of remittitur and the stipulation of plaintiff pursuant thereto did not constitute a waiver of a jury trial. They were integral incidents of a jury trial actually had which eventuated by constitutional practice in a judgment actually entered * * *. *We think the compromise provision of Section 29 of the Workmen's Compensation Law was not intended to apply to the procedure here in question. Plaintiff's stipulation consenting to take that portion of the verdict judicially determined as being not excessive, does not fall within any recognized meaning of the word "compromise."* [*Gallagher* v. *Carol Construction Co.*, 272 N.Y. 127, 129, 5 N.E. 2d 63 (1936); emphasis added.]

This ruling is in accord with sound policy and legislative purpose. The purpose of Section 33(g) is to make certain that an employee's independent management of his lawsuit against the third person does not operate to the detriment of his employer. See *Bell* v. *O'Hearne*, 284 F. 2d 777, 780 (C.A. 4). The provision thus presumes that a compromise not consented to by the employer may be prejudicial to him and provides for the forfeiture of compensation benefits to void the prejudicial effect. The danger of a compromised settlement to the employer —that it might understate the third party's liability and so increase the employer's—is not presented by a remittitur, which is a judicial determination, in an adversary proceeding, of the maximum recoverable damages. See *Bell* v. *O'Hearne, supra*, 284 F. 2d at 780; cf. *Chapman*

v. *Hoage*, 296 U.S. 526, 532; *Weyerhaeuser Timber Co.* v. *Marshal*, 102 F. 2d 78, 81 (C.A. 9). To be sure, where the employee accepts the remittitur, he foregoes the possibility that at a new trial additional evidence might be presented that would result in an award of greater damages which the courts would allow to stand. Such a possibility, however, is "too remote and fanciful to merit consideration." *Bell* v. *O'Hearne, supra*, 284 F. 2d at 781. Conduct of an employee toward a third party which is not clearly a compromise within the normally recognized meaning of that word, even though unconsented to by the employer, will not work a forfeiture of compensation benefits unless the employer is substantially prejudiced. See *Chapman* v. *Hoage, supra*, 296 U.S. at 532; *Bell* v. *O'Hearne, supra*, 284 F. 2d 780-781; *Weyerhaeuser Timber Co.* v. *Marshall, supra*, 102 F. 2d at 81; *Candado Stevedoring Corp.* v. *Lowe*, 85 F. 2d 119, 120-121 (C.A. 2), certiorari denied, 299 U.S. 588. There has been no such showing of substantial prejudice by the employer-respondent.

In sum, the language and purpose of Section 33(g) support the view that a remittitur is not a compromise. Such an interpretation results in no significant prejudice to the employer and is the only reading consistent with this Court's admonition that the Longshoremen's Act "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results." *Voris* v. *Eikel*, 346 U.S. 328, 333.

Respectfully submitted,

THURGOOD MARSHALL,
Solicitor General."

JULY 1967.

C. THERE WAS COMPETENT EVIDENCE TO SUPPORT A CAUSAL RELATIONSHIP BETWEEN THE FATAL FALL AT HOME AND DECEDENT'S WORK.

In the answer to the Petition for Writ of Certiorari the employer asserted the argument that there was no competent evidence to support a causal connection between the fall at home and decedent's work. Comment is made as to this argument in order to cover all phases of this case.

This argument has been presented to this Court on a number of occasions. Specifically we refer the Court to the cases of *O'Leary* v. *Brown-Pacific Maxon,* 340 U.S. 504, and *O'Keeffe* v. *Smith Associates,* 380 U.S. 359.

On page 508 of the *O'Leary* case, *supra,* the Court said: "Both sides conceded that the scope of judicial review of such findings of fact is governed by the Administrative Procedure Act. Act of June 11, 1946, 60 Stat. 237, 5 U.S.C. Sec. 1001 et seq. The standard, therefore, is that discussed in *Universal Camera Corp.* v. *Labor Board,* ante, p. 474. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole."

On page 361, of the *O'Keeffe* case, the Court first quotes from the case of *Cardillo* v. *Liberty Mutual Ins. Co.,* 340 U.S. 469, from page 478 as follows: "It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may

not be disturbed by a reviewing court. . . . Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. . . .' *Cardillo* v. *Liberty Mutual Ins. Co., supra,* at 478.

"The rule of judicial review has therefore emerged that the inferences drawn by the Deputy Commissioner are to be accepted unless they are irrational or 'unsupported by substantial evidence on the record . . . as a whole.' *O'Leary* v. *Brown-Pacific Maxon, Inc., supra,* at 508."

In both the *O'Leary* case and the *O'Keeffe* case the Court indicates that though they may have not reached the same conclusion there was sufficient evidence upon which the Deputy Commissioner could have based his finding.

Likewise, in this case there was sufficient evidence in the record to sustain the Deputy Commissioner's finding of fact relative to the injury of January 30, 1961, as was the verdict of the 12 jurors in the 3rd party action in the federal court who heard the same evidence pertaining to the same occurrence and who by their verdict came to the same conclusion as did the Deputy Commissioner that the injury and death of John Banks occurred as a result of the accident of January 30, 1961.

CONCLUSION

We respectfully request this Court to reverse the judgment of the Court below, and to affirm the judgment of the Federal District Court.

Respectfully submitted,

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